PAUL C. LEWIS ET AL.
v.
BUREAU OF LAND MANAGEMENT

IBLA 96-178 Decided August 16, 1999

Appeal of an order issued by Administrative Law Judge Harvey C. Sweitzer dismissing grazing appeals because they had not been timely filed with the Bureau of Land Management. NV-050-95-23 through NV-050-95-27.

Affirmed.

1. Administrative Procedure: Burden of Proof--Evidence: Burden of Proof--Evidence: Sufficiency--Evidence: Presumptions

There is a legal presumption, which is rebuttable, that official acts of public officers are regular. On the other hand, there is a presumption that mail properly addressed and with adequate postage affixed, and deposited in an appropriate receptacle, is duly delivered. When these two presumptions come into conflict and BLM states that it did not receive the instrument, the burden is on the one asserting that it was delivered to show that it was, in fact, timely received by BLM.

APPEARANCES: Karen Budd-Falen, Esq., and Daniel B. Frank, Esq., Cheyenne, Wyoming, for Appellants; John R. Payne, Esq., Office of the Solicitor, Pacific Southwest Region, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Paul C. Lewis, et al. (Appellants) 1/ have appealed Administrative Law Judge Harvey C. Sweitzer's January 11, 1996, order granting a Bureau of Land Management (BLM or Respondent) motion to dismiss the Appellants' appeals of five 1995 grazing decisions for failure to timely file

1/ Appellants, in addition are Paul C. Lewis (NV-050-95-23), including John Wittwer (NV-050-95-24), Keith Cutler (NV-050-95-25), Donald Whitney (NV-050-95-26), and Melburn Jensen (NV-050-95-27). Each of the Full Force and Effect Decisions of the Stateline Resource Area appealed from is dated Feb. 16, 1995.

appeals of the underlying 1993 BLM decisions granting them 10-year grazing permits upon which the challenged 1995 decisions were based. The appealed 1995 decisions were issued by the Area Manager, Stateline Resource Area, Las Vegas District, BLM.

The present appeals began when Appellants appealed grazing decisions issued by BLM on February 16, 1995, which denied their applications for spring grazing from March 1 to June 14, 1995. The February 16, 1995, Full Force and Effect Decisions were based in part on the aforementioned 1993 10-year grazing permits which did not authorize spring grazing, none of which BLM found had been appealed, and in part on 1991 and 1994 Biological Opinions of the U.S. Fish and Wildlife Service (FWS) which cautioned against the effects of spring grazing on the Mohave Desert Tortoise.

In the appeal before Judge Sweitzer, BLM argued that Appellants were really attempting to appeal the terms and conditions of the underlying 1993 permits, which it argued were final. Therefore, BLM moved to dismiss these appeals based upon the failure of Appellants to appeal the prior controlling decisions. See BLM's Motion to Dismiss, Response to Appellants' Motion to Consolidate (hereinafter Motion to Dismiss) at 6, 8-10.

In his January 11, 1996, Decision dismissing the appeals, Judge Sweitzer held, in part:

> Each appellant contends that the pertinent earlier decision issued in 1993 was appealed by transmitting the appeal by regular mail to BLM. Respondent maintains that BLM never received an appeal of the 1993 decisions from any of these appellants.
>
> As noted in my Order dated August 30, 1995, this dispute is governed by the principles of law set forth by the Interior Board of Land Appeals (Board) in Fawn Rupp, 65 IBLA 277, 278-79 (1982):
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> > Various presumptions come into play when an appellant alleges transmittal of an instrument, but BLM has no record of its receipt. On one hand, there is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. See, e.g., Legille v. Dann, 544 F.2d 1 (D.C. 1976); Bernard S. Storper, 60 IBLA 67 (1981); Phillips Petroleum Co., 38 IBLA 344 (1976). On the other hand, there is a presumption that mail properly addressed and with adequate postage affixed, and deposited in the appropriate receptacle, is duly delivered. See, e.g., Donald E. Jordan, 35 IBLA 290 (1978). When these two presumptions have come into conflict, the Board generally has accorded greater weight to the former. See David F. Owen, 31 IBLA 24 (1977). We believe that public policy considerations dictate that greater weight be given to the presumption of regularity over that accorded the presumption that mail, duly addressed, stamped, and deposited, is delivered.

> Thus, where after diligent and thorough search BLM states it did not receive the instrument, the burden is on the appellant to show that the instrument was, in fact, timely received by BLM. See H.S. Rademacher, 58 IBLA 152, 88 I.D. 873 (1981).

Appellants correctly note that the presumptions of regularity can be rebutted by any substantial evidence tending to show that BLM's action was not regular in a particular instance. Leon F. Scully, Jr., 104 IBLA 367, 370 (1988). If such a showing is made, the case is decided without reference to the presumption, and the appellants must prove their case by a preponderance of the evidence. Id.

Appellants argue that the presumption of regularity should not apply for five (5) reasons: (1) BLM does not maintain a log of uncertified mail, (2) BLM applied to each of the appellants a 1993 stay of the pertinent earlier decision, implying that each appellant had appealed the earlier decision and was a party to the proceeding in which the stay was issued, (3) a BLM motion dated June 29, 1993, raised the issue of failure to appeal the 1993 decisions with respect to some but not all of the appellants, thus implying that some of the appellants had, in fact, appealed the 1993 decisions, (4) BLM did not cite its nonreceipt of an appeal of the 1993 decision as a basis for denying each of the appellants' grazing applications in 1994, and (5) BLM has been tardy in forwarding appeals to this office. As more fully discussed below, none of these reasons rebuts the presumption of regularity.

The absence of a log for uncertified mail does not rebut the presumption of regularity for at least two reasons. First, respondent showed that BLM has a regular practice of logging in all appeals and appellants did not present substantial evidence to show that this regular practice was not followed with respect to the instant appeals. Second, appellants have not presented substantial evidence to show that this regular practice was an unreliable method of tracking the receipt of appeals. The existence of another option for tracking the receipt of appeals, i.e., logging all uncertified mail, does not rebut the presumption of regularity with respect to practice actually in use.

The 1993 stay of the pertinent earlier decisions issued in 1993 arose in a proceeding involving different appellants. Consequently, it did not charge each of them with trespass for violations of the terms of the pertinent 1993 decision. Appellants read BLM's determination as an acknowledgment that each of the appellants had appealed the pertinent 1993 decision. This reading of BLM's determination cannot be sustained because it is speculative. There are equally plausible reasons for the

determination, including the one asserted by respondent that the determination was a policy decision and not an admission that each of the appellants had appealed the pertinent 1993 decision.

Appellant's third argument is another speculative attempt to attribute motives for BLM's actions. They find significant BLM's omission of some of the appellants from its 1993 motion regarding the failure of certain permittees to appeal the pertinent 1993 decisions. The omission was purportedly based upon BLM's belief that each of the omitted appellants had, in fact, appealed the pertinent 1993 decision. This is an unsupported assumption. Again, respondent offers an equally plausible explanation for its actions based upon the varying circumstances of the permittees.

Appellants fourth argument is yet another speculative attribution of motives for BLM's actions. According to appellants, BLM must have believed that each appellant had appealed the pertinent 1993 decision because BLM did not cite its nonreceipt of an appeal of the pertinent 1993 decision as a basis for denying each of the appellant's grazing applications in 1994. Again, respondent offers an equally plausible explanation for its actions, i.e., that BLM based each denial upon its belief that the pertinent biological opinion was binding upon BLM and not subject to review by this office.

In sum, reasons (2), (3), and (4) are based upon pure speculation and are inapposite as to the issue of whether BLM's actions were regular. Similarly, the alleged fact that BLM may be dilatory in forwarding appeals to this office is not probative as to the issue at hand, unless one speculates that the alleged delays are caused by inadequate tracking procedures. There is simply little or no concrete evidence to rebut the presumption of regularity, such as evidence of a lack of procedures or resources at BLM to handle the receipt of appeals or of confusion or loss of appeals. See June I. Degnan (On Reconsideration), 111 IBLA 373, 374 (1990). Therefore, the presumption of regularity must be applied and the motion to dismiss must be, and is hereby, granted.

(January 11, 1996, Decision at 1-3.)

On appeal to this Board, Appellants argue that BLM, not Appellants, had the burden of proof to show that it failed to receive the Appellants' appeals, that BLM cannot meet this burden, and that Judge Sweitzer's decision should thus be reversed. (Statement of Reasons (SOR) at 13-14.) Appellants further argue that BLM is not entitled to a presumption of regularity in this case regarding the proper processing of the appeals which they claim were filed, because mail that is not certified mail is not logged in. (SOR at 16.) In other words, Appellants claim, BLM cannot

meet its burden that would justify a grant of a presumption of regularity, unless it tracked mail sent as regular mail just as it tracked certified mail. This it did not do. Id. Further Appellants claim, a presumption of regularity should not be accorded BLM here because it applied Judge Rampton's 1993 stay to these appellants even though it now says they had not filed appeals. (SOR at 17.) Moreover, Appellants claim, BLM's full force and effect decisions in 1994 were issued using a different rationale (the FWS Opinion) than that the Appellants had failed to appeal the 1993 decisions, thus giving credence, Appellants claim, to their argument that BLM believed they had appealed the 1993 decisions. Equally important, Appellants claim, the use of a different rationale in 1995 than in 1994 to deny spring grazing further reflects the lack of regularity in BLM's appeal processing. (SOR at 18.) Finally, Appellants claim, the unusual delay observed in BLM's transmittal of grazing appeals to the Board reflects further evidence that a presumption of regularity is unjustified with regard to its appeal processing procedures. (SOR at 19.)

Appellants also contend in their appeal that Judge Sweitzer may have erred "in failing to recognize the circumstances giving rise to the assumption that the Appellants' appeals were timely filed with the BLM." (SOR at 20.) Because, Appellants claim, BLM is not entitled to a presumption of regularity regarding its appeals processing, the issue is whether a preponderance of the evidence supports Appellants' contention that their appeals were timely filed with the Stateline Resource Area Office. Id. Appellants contend that the following factors support a determination that it is more likely than not that the appeals were properly delivered: (1) Vicky Demshar of the Budd-Falen Law Offices states in her affidavit that she placed the appeals in a single envelope in the regular mail on February 24, 1993, the same date she placed the originals in the certified mail to the Salt Lake City Office of Hearings and Appeals (OHA) office; (2) the return receipt card for the certified mail indicates that OHA received its copy on February 26; and (3) given past practice, it is more probable than not that BLM did not properly process the appeals. (SOR at 21.)

In its Response, BLM states that because the decisions appealed from were signed by the Area Manager for the Stateline Resource Area, that office was the proper office to file a notice of appeal. (Response at 3, citing 43 C.F.R. § 4.470(a).) BLM notes that "Appellants have never explained why, when any appeals were to be filed in the office of the authorized officer, they (allegedly) sent appeals by certified mail to the Office of Hearings and Appeals, but did not send appeals by certified mail to the Stateline Resource Area." Id.

In response to Appellants' assertion that BLM failed to produce evidence of how it handled regular mail, although it produced evidence of how it logged certified mail, Respondent states that it produced evidence of how it handles all appeals, regardless of how the appeal arrives. (Response at 4.) Respondent next addressed Appellants' claim that because BLM only named some of the permittees from which it had not

received 1993 appeals in a 1993 motion, it was "admitting" it had received Appellants' appeals. BLM states, to the contrary, that the 1993 motion referred to permittees whose decisions had expired on or before the 1993 decisions went into effect, not the case for the present Appellants. BLM explains that it was not "admitting" that it had received appeals from the permittees it did not mention, it was just unsure at the time it made its motion that those permittees should be treated the same as the ones whose prior permits had expired on their face. (Response at 5.)

Respondent next addressed Appellants' claim that because they were not cited for trespass in 1993, BLM was admitting that the 1993 decisions were appealed. BLM explains that BLM made a policy decision in 1993 to apply Judge Rampton's decision to all of the permittees in certain allotments affected by the Biological Opinion, regardless of whether they were appellants. BLM states that this was not an admission that the 1993 decisions had been appealed. (Response at 5.)

In response to Appellants' claim that BLM has the burden of proof in this matter, Respondent notes that the Board has held that the burden of proof in a grazing matter is on the party objecting to the grazing decision. (Response at 8, citing Wayne D. Klump v. BLM, 124 IBLA 176, 182 (1992).) Respondent further notes that the standard of proof the objecting party must meet is the preponderance of the evidence test. Id., citing Ralph and Beverly Eason v. BLM, 127 IBLA 259 (1993).

In addressing the regularity of the processing procedures followed by BLM, Respondent reiterated that, before Judge Sweitzer, it had described how mail in general was processed, then how appeals were handled. (Response at 9, citing Respondent's Reply, Ex. A.) Respondent stated that "[i]t did not offer evidence with regard to certified as opposed to regular mail, nor is such evidence relevant." Id.

Finally, Respondent addresses Appellants' claim that BLM's alleged tardiness in forwarding appeals to OHA is evidence that the presumption of regularity should be rebutted. Respondent urges that Appellants mix apples and oranges. (Response at 11.) Respondent claims that whether BLM forwards appeals in a timely manner or not is irrelevant to the question of whether the Las Vegas District and Stateline Resource Area offices properly handled incoming mail, and any appeals allegedly in that mail, in 1993. Id. We agree.

[1] Prior Board decisions make clear that when the record contains facts supporting both the presumption of regularity and the presumption that documents properly mailed are duly delivered, public policy requires that greater weight be accorded to the former. This conclusion is also supported by a burden of proof analysis. Bernard S. Storper, 60 IBLA 67, 70 (1981), aff'd, Storper v. Watt, Civ. No. 82-0449 (D.D.C. Jan. 20, 1983). Although priority is afforded to the presumption of regularity, this presumption may be overcome by evidence presented by an appellant. 60 IBLA at 71. See, e.g., L.E. Garrison, 52 IBLA 131 (1981).

As in Storper, Appellants' evidence consists primarily of an affidavit stating that their appeal was mailed. It is receipt of the document, however, which is critical. Though we accept as true Appellants' agent's affidavit, such affidavits do not overcome the presumption of regularity. William R. Gaechter, 66 IBLA 230, 232 (1982). See also Wilson v. Hodel, 758 F.2d 1369, 1374 (10th Cir. 1985).

Administrative officials are presumed to have properly discharged their duties and not lost or misplaced legally significant documents submitted for filing. H.S. Rademacher, 58 IBLA 152, 88 I.D. 873 (1981). This presumption of regularity is not overcome by an uncorroborated statement that the document was submitted to BLM or by evidence that the claimant timely filed it with OHA. See John R. Wellborn, 87 IBLA 20 (1985). Nor do any of Appellants' other submissions support a different conclusion. The receipt from OHA upon which Appellants also rely is more troubling than supportive. Why would a litigant file documents through the regular mail in the one required location, yet transmit the same documents by certified mail to an unrequired location. More importantly, why were both not submitted by certified mail.

Examples of acceptable evidence demonstrating that a filing was received would include a copy of a return receipt with a datestamp showing receipt by BLM within the proper filing period or a BLM-prepared acknowledgment receipt. As for the fact that Appellants transmitted their filing by mail, it is well established that a claimant must bear the consequences if a filing is lost by the Postal Service or if delivery does not follow within the time period allowed for filing. See Alice R. Kirk, 88 IBLA 4 (1985); Paul E. Hammond, 87 IBLA 139 (1985). In this case, there is simply insufficient evidence to overcome the presumption of regularity and establish that the appeals documents were filed with the Stateline Resource Area Office. Thus, Appellants' uncorroborated statement in the form of an employee's affidavit is insufficient to overcome the presumption of regularity. See Wilson v. Hodel, 758 F.2d 1369, 1374 (10th Cir. 1985).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Sweitzer's dismissal order is affirmed.

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James P. Terry
Administrative Judge

I concur:

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James L. Byrnes
Chief Administrative Judge